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Supreme Court, U.S.
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No. 98-1636

In The

Supreme Court of the United States

BLUE CROSS OF CALIFORNIA, CALIFORNIACARE HEALTH PLANS, WELLPOINT HEALTH NETWORKS INC., A California Corporation,

Petitioners,

vs.

CALIFORNIA SUPERIOR COURT; ELIZABETH FARQUHAR and LAURIE WINETT, individually, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

Petitioners (hereafter "Blue Cross") reply to new points raised by the brief in opposition of Respondents Elizabeth Farquhar and Laurie Winnet (hereafter "subscribers") asserting that: (1) "this Court lacks jurisdiction" to consider the petition;[1] (2) until a "final judgment" is entered requiring classwide arbitration of all similarly situated Blue Cross subscribers, resolution of the preemption question would be "premature";[2] and (3) "the California court[s] correctly construed the terms of the contract to permit a classwide arbitration *under California's procedural rules*."[3]

Subscribers offer no valid objection to the Court's consideration, on the merits, of the important question of statutory interpretation and constitutional law left unresolved after *Keating*.[4]

A. Jurisdiction Is Vested In This Court To Consider The Federal Questions Presented By The "Final Judgment Or Decree" Of The California Courts Denying Blue Cross's Petition To Compel Arbitration According To The Terms Of The Parties' Agreements

In arguing that "this Court lacks jurisdiction to grant Blue Cross's petition" (Brief in Oppos. at p. 8),[5] subscribers

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[1] Brief in Opp. at pp. 8 and 6-10.

[2] Brief in Opp. at pp. 6-7.

[3] Brief in Opp. at p. 12 (brackets and emphasis added); *id.* at 11-14.

[4] *Keating v. Superior Court*, 31 Cal.3d 584, 545 P.2d 1192, 183 Cal.Rptr. 380 (1982), *rev'd in part and appeal dismissed in part sub nom., Southland Corp. v. Keating*, 465 U.S. 1, 8-10 (1984).

[5] It should be noted that subscribers did not argue in any court below that the trial court's decision to allow judicially supervised classwide arbitration procedures to go forward, despite the mandates of the FAA, was not ripe for appellate review; and of course, the California court of appeal expressly found that it was. (App. 5-6.)

misread the pertinent language of the jurisdictional statute making reviewable by certiorari "final judgments or decrees" of a state's highest court on federal questions. 28 U.S.C. § 1257(a). (App. 47-48.)[6] In the instant case, Blue Cross asserted a right under federal law (the FAA) to be free from the burdens of classwide arbitration, including ongoing judicial involvement and civil discovery, on the grounds that the arbitration clause in issue did not provide for such an onerous and judicially supervised procedure.

Thus, jurisdiction in this Court is vested by virtue of the final "judgment or decree" of California's highest court which declined to enforce the provisions of the arbitration agreements between Blue Cross and the subscribers *as written*. 28 U.S.C. § 1257(a); S.Ct. Rule 13.1. (*See also* Pet. Mem. at pp. 2, 8 and App. 43.) The California courts' decisions under review in this case are in substantially the same procedural posture as in *Keating*, when this Court concluded that state law impediments to enforcement of the right to compel contractual arbitration were preempted by the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 9-10 (1984).[7]

Procedurally, *Keating* also arose through the California court system by way of petitions for writ of mandate, and related interim appeals, involving issues that "do not concern

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[6] "[I]n modern usage *decree* is broad enough to refer to *any court order* . . . " BRYAN A. GARNER, DICT. OF MODERN LEGAL USAGE at 253 (Oxford U. Press 1995) (second emphasis added).

[7] Under section 2 of the FAA, agreements to arbitrate "shall be valid, irrevocable, and enforceable. . . . " 9 U.S.C. § 2. (App. 45; Pet. Mem. at pp. 2, 9-10.)

the merits of [the parties' underlying] disputes, but rather the forum and procedure for their resolution. Southland contends that the disputes should be submitted to arbitration on an individual (i.e., franchisee-by-franchisee) basis, pursuant to an arbitration provision contained in its agreement with each franchisee." *Keating*, 31 Cal.3d at 590 (brackets added).[8]

Like the subscribers in this case, respondents in *Keating* (individual franchisees) raised the same "jurisdictional" objection to consideration of the preemption issues then before this Court. The franchisees maintained that Southland's direct appeal under the predecessor statute of 28 U.S.C. § 1257 should be dismissed because the decision of the California Supreme Court was not a "final judgment or decree." *Southland Corp. v. Keating*, 465 U.S. at 6.[9] This Court disagreed:

> Without immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue and as a result "there would remain in effect the unreviewed decision of the State Supreme Court" holding that the California

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[8] There is one significant procedural difference between this case and *Keating*: In each of the courts below, Blue Cross expressly opposed class arbitration procedures "on federal grounds" under the FAA and the Supremacy Clause. (*Cf.* Pet. Mem. at p. 11; Ct. App. Opn. at App. 2 ("the issue is whether the [FAA] preempts California decisional authority authorizing classwide arbitration"); Superior Court's order at App. 41, ¶3 ("The issue is whether the Federal Arbitration Act ('FAA') bars class arbitration, where the parties' agreement is silent on the subject").)

[9] 28 U.S.C. § 1257(2), repealed in 1988, previously allowed for the right of direct appeal from a state court if its decision "involved the validity of a state statute contested under some federal provision and the state court upheld the statute." COMMENTS ON 1988 REVISION OF 28 U.S.C. § 1257, 28 U.S.C.A. §§ 1251 to 1331 at p. 96 (West's 1993). The predecessor statute contained the identical "final judgment or decree" proviso for review on direct appeal or certiorari. *Id.* at 96-97.

> statute does not conflict with the Federal Arbitration Act. [*Citing Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975).] On the other hand, ***reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute***.
>
> Finally, the failure to accord immediate review of the decision of the California Supreme Court might "seriously erode federal policy." ***Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration***. *Southland Corp. v. Keating*, 465 U.S. at 6-7 (emphasis and brackets added).[10]

These principles of "finality" apply with equal force to the pending petition which asks for resolution of a question now squarely framed by the California courts and left undecided by *Keating* – namely, whether the FAA preempts California's state-based classwide arbitration procedures in contravention of the views expressed by a substantial majority of federal circuits and other states.

B. The California Court of Appeal Addressed, And Properly Rejected, Subscribers' "Ripeness" Argument

Subscribers next erroneously contend that consideration of the preemption question is "premature," at least until there has been a "final judgment" on certification of the class.

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[10] In more recent terms, this Court has granted certiorari to review the "interim," procedural orders of state courts *denying* petitions to compel by parties seeking to enforce arbitration contracts under the FAA, or to stay litigation commenced in violation of such agreements. *E.g.*, *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270-72 (1995) (certiorari granted after interim appeal to Alabama Supreme Court); *Doctors' Associates, Inc. v. Cassaroto*, 517 U.S. 681, 684-85 (1996) (certiorari twice granted after interim appeals denying arbitration by Montana Supreme Court).

(Brief in Oppos. at pp. 6-7, 10-11.) They claim that the case "is not yet far enough along in the proceedings to provide a complete evidentiary record to address the *Keating* issue." (*Id.* at p. 7.) This is essentially a challenge to the "ripeness" of the controversy. The court of appeal's decision below explicitly rejected "prematurity" as a proper ground to avoid deciding that issue:

> To allow discovery to proceed as to the existence of a class if classwide arbitration is not allowed would waste judicial resources and burden the parties with unnecessary expense of time and money. In addition, to defer a decision on this issue would result in "lingering uncertainty in the law." . . . Therefore, whether the trial court erred in refusing to stay the litigation is an issue that is ***ripe for resolution***. This case does not present an "abstract difference [ ] of legal opinion" for resolution, nor will it result in our issuing a "purely advisory opinion [ ]." The present case involves concrete issues – may discovery proceed on whether there should be class certification with the potential that plaintiffs will later be joined in classwide arbitration. (App. 5-6 [emphasis added, bracketed text in original and internal citations deleted].)

Undaunted, subscribers alternatively suggest that the "petition may be rendered moot when this case is permitted to go forward in the lower courts [assuming the class is *not* certified]." (Brief in Oppos. at p. 17.) Subscribers' circular ripeness/mootness argument only serves to underscore the existence of a presently justiciable controversy: The ripeness doctrine "asks whether an injury that has not yet happened is sufficiently likely to happen, and mootness asks whether an injury that has happened is too far beyond a useful remedy." 13A C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.12 at 50 (2d ed. 1984); *see also Warth v. Seldin*, 422 U.S. 490, 499, n. 10 (1975). Once forced to go

through the "class certification" process, a party in the position of Blue Cross has lost the benefit of the federal statute. Again, *Keating* provides the answer:

> The [FAA] permits "parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible."
>
> Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. *Southland Corp. v. Keating*, 465 U.S. at 7; *citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983) (brackets in original text, internal citation omitted).

When the California Supreme Court declined to review the published decision of the court of appeal approving the implementation of *Keating*'s classwide arbitration procedures, that was "the final word of a final court." (Brief in Oppos. at pp. 8-9; *citing Jefferson v. City of Tarrant*, 522 U.S. 75, 118 S.Ct. 481, 485-86 (1997). As amici aptly point out, not only is the decision on the preemption question *final* in the sense that it is reviewable, the opinion below "is precedent on this issue which all lower California courts must follow" until it is overturned. (Amici Brief of AFSA, et al. at pp. 9-10 & n. 5.)[11]

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[11] Subscribers take the court of appeal's discussion of "prematurity" later in its opinion out of context. In response to Blue Cross's objection that it should not be required to participate in "hybrid" classwide arbitration requiring judicial intervention, the opinion suggested based upon earlier California cases that "[t]his argument is premature" as a rationale for barring a classwide arbitration that had not yet been certified. (App. 33; Brief in Oppos. at 6.) The substantial weight of authority in other jurisdictions applying the FAA is in fundamental disagreement with that point of view. (*See* Amici Brief at pp. 8-18; Pet. Mem. at 11-18; Section C, *infra*, at pp. 8-9.)

C. The Benefit Agreements Provided That The "American Arbitration Association Commercial Arbitration Rules" Would Govern – Rather Than California Arbitration Act Procedures As Subscribers Erroneously Maintain

Subscribers' final contention – that a California choice-of-law clause somehow incorporated classwide procedures into the subscription agreements – is built on a false premise. (Brief in Oppos. at pp. 11-12.) The court of appeal's decision rejected this construction, which stems from the subscribers' misinterpretation of *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989):

> Contrary to plaintiffs' assertion, *Volt* does not compel this court to conclude that by virtue of the choice-of-law provision in the underlying health insurance agreements the parties agreed California's classwide arbitration rule would govern this case. . . . *Volt* [ ] rested on the assumption the parties had incorporated California arbitration rules into their agreement[. . . , and] *Volt* held only that the act does not prevent the enforcement of agreements to arbitrate under state rules. (App. 31, n. 8; *citing Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-60 & n. 4 (1995) [brackets added, internal citations omitted].)

Further contrary to their argument, "There has been no finding in the present case that the parties expressly agreed to incorporate California's arbitration rules into their agreements." (App. 31, n. 8; *see also* Pet. Mem. at p. 22.) Instead, the agreements to arbitrate provide for resolution of individual disputes governed by the procedures of the AAA Commercial Arbitration Rules. (*See* Brief in Oppos. at p. 4, ¶C.) The controversy exists because the California courts erroneously accepted subscribers' position that compelling

classwide arbitration "does not conflict" with their agreements to proceed under the AAA commercial rules. (Brief in Oppos. at p. 10; App. 33.)[12]

Almost simultaneously with the decision of the California court in this case holding that state-based classwide procedures were "consistent" with the FAA where the parties have selected the AAA commercial rules, the Alabama Supreme Court reached exactly the opposite conclusion. In *Med Center Cars, Inc. v. Thompson*, 727 So.2d 9 (Ala. 1998), as in the present case, defendants argued "that most federal courts have rejected the use of class-wide arbitration, regardless of whether the proceedings involved common questions of law or fact, unless the language in the arbitration agreement specifically provides for class-wide arbitration." 727 So.2d at 20. The "plaintiff class representatives" urged the adoption of state-based classwide procedures because the parties' agreement and "the FAA [were] silent as to that issue." *Ibid.* The Alabama Supreme Court held:

> Although the plaintiffs' contentions are practically appealing, after reviewing the authorities we conclude that to require class-wide arbitration ***would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration***. *Med Center Cars*, 727 So.2d at 20 (emphasis added).[13]

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[12] Notwithstanding subscribers' erroneous interpretation, AAA's commercial rules *do not* provide for classwide arbitration; at best, they are "silent" on the subject. (Compare Brief in Oppos. at pp. 7-8 with AAA commercial rules at App. 63-67.) Moreover, a substantial body of cases acknowledge AAA's "long-established policy *of not approving [even] consolidation [of arbitrations] without the written consent of all parties*." *Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.*, 93 Wash. 2d 199, 203, 607 P.2d 856, 858 (1980) (brackets added). (Pet. Mem. at pp. 14-15 & n. 6.)

[13] *Med Center Cars* also observed that "no persuasive authority permitting class-wide arbitration exists at this time. . . . 'For a federal court to read such a term [class-wide arbitration] into the parties' agreement would 'disrupt [ ] the negotiated risk/benefit allocation and direct [ ] [the

Presently, a majority of states and the "Second, Fifth, Sixth, [Seventh,] Eighth, Ninth, and Eleventh Circuits have held that ***absent an express provision in the parties' arbitration agreement***, the duty to rigorously enforce arbitration agreements . . . [precludes] consolidated [or classwide] arbitration," because to do so would fundamentally and impermissibly alter the nature of the agreement to arbitrate. *Med Center Cars*, 727 So.2d at 20 & n. 4 (emphasis added) (classwide procedures rejected as inconsistent with AAA commercial rules chosen by the parties). The First Circuit, California and Pennsylvania have taken the opposite position. (App. 17-25 & n. 5.)

Consistent with the majority view of the FAA's requirements, Blue Cross has argued in the California courts "there would be nothing in the contract that could possibly constitute evidence of an intent to [submit to judicially-imposed classwide arbitration procedures]." *Mastrobuono*, 514 U.S. at 59-60; *Doctors' Associates*, 517 U.S. at 688. (Pet. Mem. at 18-25.) This important question of statutory construction and constitutional preemption is ripe for determination. If not decided by this Court, then conflicting interpretations of the FAA will continue in the state and federal courts unabated. (Pet. Mem. at pp. 25-27; Amici Brief at pp. 15-19.)

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parties] to proceed with a different sort of arbitration. . . . ' " 727 So.2d at 20; *citing Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) *quoting New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Selya, J., dissenting) (brackets in original). (*Cf.* Pet. Mem. at pp. 17-18 & n. 9.)

CONCLUSION

None of subscribers' objections – to jurisdiction, ripeness or the procedural rules governing the agreements to arbitrate – is well taken. The petition for writ of certiorari accordingly should be granted.

Respectfully submitted,

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